UNITED STATES
v.
GAYLORD LAMBETH ET AL.

IBLA 78-311 Decided September 29, 1978

Appeal from a January 6, 1978, decision of Administrative Law Judge Michael L. Morehouse declaring null and void four placer mining claims situated sec. 6, T. 14 S., R. 32 E., Willamette meridian, Grant County, Oregon. Oregon 9298, 9312, 9318.

Affirmed.

1. Mining Claims: Discovery: Generally

A discovery exists only where minerals have been found in such quantities that a person of ordinary prudence would be justified in the further expenditure of his labor and means with the reasonable expectation of developing a valuable mine.

2. Mining Claims: Discovery: Generally

When the Government through the testimony of an expert mineral examiner has alleged a lack of valuable mineralization, the burden of showing the contrary by a preponderance of the evidence shifts to the contestees.

3. Mining Claims: Discovery: Generally

The value of common varieties of sand and gravel not locatable under the mining laws cannot be considered in the evaluation of the value of placer gold to determine whether there has been a discovery of a valuable deposit of gold on a contested mining claim, where it is clear that the mineral claimants made no discovery of a valuable mineral deposit prior to July 23, 1955.

APPEARANCES: Harold Banta, Esq., Banta, Silven and Young, Baker, Oregon, for contestees; Lawrence E. Cox, Office of the Regional Solicitor, Portland, Oregon, for the United States.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Gaylord Lambeth, Merrill Lambeth, Mary Anna Lambeth, and George S. Black appeal from the January 26, 1978, decision of Administrative Law Judge Michael L. Morehouse declaring null and void various placer claims held by appellants in Grant County, Oregon. The claims here at issue encompass lands described in three separate patent applications, designated as the Unnamed Placer Mining Claim, claimed by Gaylord Lambeth (Oregon 9298), the Whitehead Smith and First Chance Placer Mining Claims, claimed by Merrill and Mary Anna Lambeth (Oregon 9312), and the Placer Mining Claim (east half by the original No Name Placer), claimed by George S. Black (Oregon 9318). These claims, which are contiguous, are all located in sec. 6, T. 14 S., R. 32 E., Willamette meridian, Grant County, Oregon.

By contest complaints dated August 22, 1975, and February 2, 1976, the Oregon State Office, Bureau of Land Management (BLM), charged that minerals had not been found on the subject claims in sufficient quantities to constitute a valid discovery and that the lands embraced within the three patent applications were nonmineral in character. At the request of the various claimants, the cases arising from the contest complaints were consolidated, and a single hearing in the matter was held before Judge Morehouse on June 21, 1977, at Canyon City, Oregon. Appellants generally denied the charges set forth in the complaints, asserted the existence of a valuable mineral discovery on each claim, and argued that the mineralization uncovered on the claims was sufficient to support their several applications for patent.

The Government mineral examiner, Robert F. Ciesiel, testifying on behalf of the contestant, offered his expert opinion that a reasonable man would not be justified in the expenditure of his labor and means in attempting to develop a profitable mining operation on the claims. Ciesiel testified that he spent about "three full weeks" (Tr. 48) examining the claims, and the decision below summarized his findings as follows:

> Robert F. Ciesiel, a BLM mining engineer for the last fifteen years, testified that he examined all three claims on four different occasions between May 1973 and June 1976. He testified that on the first day of his examination each claimant was present on the claim and indicated their points of discovery. With respect to Claim No. 9312 he sampled each of the areas pointed out

by Mr. Merrill Lambeth and, in fact, sampled new ground which had been "opened up" by contestees. He took nine samples, had these samples assayed (see Ex. G-2), and, using a gold value of $150.00 a troy ounce, got values of $1.16, $.06, $.71, $.10, $.25, $.25, $.16, $.08, $.69, respectively, per cubic yard. He stated that, because Mr. Lambeth had told him the gold had a coating on it, he instructed the assayer to extract all the gold he could through amalgamation and then to grind the sample, which was done. In some cases the assayer got a little more gold, and in other cases he did not.

With respect to Claim No. 9318, Mr. Ciesiel took six samples and Samples 1, 3, 3(b), 4, and 5 had values of $.97, $.03, $2.88, $.38, and $.06, respectively, per cubic yard. Sample No. 2 was entirely of clay and would not work in his sluice box so he took a 1-pan sample and puddled it. No visible gold was seen in that sample. These values were determined after assay (see Exs. G-8, G-9, and G-10) and gold valued at $150.00 per troy ounce was used as a standard throughout. With respect to Sample No. 3(b), which had a value of $2.88 per cubic yard, the sample was taken from an area that was once a horse pen and is now a garbage dump. It was his opinion that in the early days of placering a water course concentrated loose gold in that area.

Mr. Ciesiel took five samples from Claim No. 9298 valued at $2.25, $.03, $.04, $.07, and $.16, respectively, per cubic yard. (See assay certificates, Exs. G-13 and G-14.) He testified that Sample No. 9298-1, which had a value of $2.25 per cubic yard, was pointed out to him by the claimant as being the "pay zone" which was actually about one-third of a bank. He stated that if the area was mined the whole bank would have to be removed and so these $2.25 per cubic yard values would be reduced in value to approximately $.75 per cubic yard. He took pictures of the areas sampled on each of the claims. (See Exs. G-5, G-6, and G-7, Claim No. 9312; Exs. G-11 and G-12, Claim No. 9318; Exs. G-15 and G-16, Claim No. 9298.)

The record shows that the general area of the claims had previously been "considerably mined" although there were unmined areas on the claims (See Ex. G-1) which were unmined due to the presence of buildings of the old town of Marysville, which has now apparently passed into oblivion.

Mr. Ciesiel testified that the majority of the claims were mined in the early placering days. He considered

> three methods of mining (1) hand shoveling, (2) ground sluicing, (3) using a backhoe or front-end loader to put the placer material into a sluice box or some other type of washing machine. He investigated a hand shoveling operation and figured use of a pump at $.50 a day, fuel costs at $2.50 a day, labor at $2.30 an hour, the minimum wage, or a total of $21.40 per man-shift. A man can shovel approximately four yards per day, which indicates he has to have gravels of $5.35 per yard to pay himself a minimum wage. He investigated another operation that is valued at approximately $100,000.00. This operation uses a three-yard front-end loader, a dump truck, and a Coleman feeding and devibrating screen and wash plant. It is a one-man operation averaging 50 yards per day and needs $ 3.00-a-yard gravels to operate and make a modest profit. He also investigated a redi-mix company that processes gravels for construction. He felt that this would be quite similar to a mining operation except for the crushing, and he estimated it costs them about $2.00 a yard, which would just pay wages, run the machinery, and amortize equipment costs, but would not include any profit. He further estimated that ground sluicing would require gravels to have values of approximately $2.04 per cubic yard, figured at processing 9 cubic yards a day.

Mr. Merrill Lambeth, the principal witness for the contestees, responded to Mr. Ciesiel's conclusions by criticizing Ciesel's sampling technique, claiming that it resulted in artificially low assay values due to the peculiar nature of the gold on the disputed claims. Lambeth asserted, and the claimants generally argue on appeal, that the gold in the area has an "oily soapstone-like coating" which significantly alters its specific gravity and causes it to float through a sluice box without settling, thus preventing its recovery by normal placering methods. Lambeth stated that the gold deposits could be effectively placered by first exposing the sands to the air and allowing the coating to "leach out," or by agitating the gravels in a cement mixer prior to running them through a sluice box. Ciesiel responded to this assertion saying (Tr. 120, 121),

> I disagree with that completely. I can't see the advantage of putting this gold through a cement mixer. I can certainly see the -- there is antimony which is what the white coating is on some of that gold. And this is on some of the gold, but I can't see how this could be eliminated by grinding the whole sample with all the gravels. I've never heard of it and I can't see it. Having a coating on some gold is fairly common. But it wasn't that extensive to offset the amount of recovery. * * * Gold has a specific gravity of 20 point

> something, and it is heavy. The antimony that is on it is a very fine, minute coating, would have a tendency to decrease the specific gravity somewhat, but I have at times put shot -- lead shot through my sluice box to show that I recover the shot; so, I'm sure that any gold with a coating of antimony would still be recovered. There is a possibility of -- and it does happen -- Snake River gold which is extremely fine -- it's some of the most flour gold there is -- that if there's any oil or something like that, it will have a tendency to float.

These differences of opinion regarding the necessary treatment of the "coated" gold remain as a major point of contention on appeal.

Another issue which was raised by the testimony below and which remains as an issue on appeal is the weight and effect which should be accorded to the fact that the disputed claims encompass the town site of Marysville, Oregon, a mining community which flourished in the latter part of the 1800's amid lands which were extensively and profitably mined by placering during that time. Appellants contend that the ground within the claims was heavily mined during the last century, "right up to the areas formerly occupied by the buildings and other improvements formerly comprising the old town site * * *." Appellants assert that, "these facts add support to * * * circumstantial character to indicate the probable presence of minerals within the unworked ground." The Government, however, does not affirmatively concede that the claims encompass ground which was not placer mined (Tr. 40) in the 1800's, and dismisses contestees' argument that the townsite could be expected to contain values similar to those extracted from adjoining lands in the 1800's, as mere geologic inference which cannot substitute for an affirmative showing of a valuable discovery. Contestees, on appeal, deny that their "unmined townsite" argument is advanced as a substitute for discovery, and characterize it, instead, as "providing strong independent corroboration of the values recovered * * * through testing and mining operations upon the ground."

[1] While the contest complaints which initiated this action charge that the lands at issue are nonmineral in character, we note that the Government, in its reply brief, conceded the validity of contestees' arguments to the contrary. Thus, the only issue remaining for decision in the contest is the question of whether contestees have established a discovery of valuable mineralization on the claims. As we have held on numerous occasions, a discovery exists only where minerals have been found in quantities such that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. United States v. Maley, 29 IBLA 201 (1977); United States v. Arcand, 23 IBLA 226 (1976). See also, Castle v. Womble, 19 L.D. 457 (1894). Chrisman v. Miller, 197 U.S. 313 (1905). This standard,

often referred to as the "prudent man" rule has been elaborated to require a showing that the mineral in question can presently be extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968); United States v. Vaux, 24 IBLA 289 (1976).

[2] By initially going forward with a prima facie showing that no valuable discovery has been made, the Government throws the burden of establishing discovery, by a preponderance of the evidence, upon the contestees. It is a well-settled rule that the Government adequately establishes a prima facie case when its mineral examiner samples a claim and offers his expert opinion that there does not exist on the claim such mineral values as would constitute discovery under the prudent man rule. United States v. Hunt, 29 IBLA 86 (1977); United States v. Bechthold, 25 IBLA 77 (1976). In the present case, the opinion of Robert F. Ciesiel, based on a 3-week study of the claims, was clearly sufficient to establish the Government's prima facie case. Bechthold, supra. Ciesiel's testimony thus placed upon appellants the burden of going forward with an affirmative showing of discovery within the meaning of the prudent man rule. United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

The contestees, in the proceeding below, sought to demonstrate discovery largely through the testimony of Merrill and Gaylord Lambeth, neither of whom claims to have ever attempted serious, commercial scale mining on the claims. Indeed, the only work which claimants have done on the ground, beyond sampling and sporadic hobby mining, was in 1951 when Merrill Lambeth used a big "cat" to break out "false bed rock" and then placered the underlying gravels. According to Lambeth's testimony, the 700 yards of gravel which he processed in 1951 yielded 14.5 ounces of gold. As the decision below notes, this is an impressive recovery, with these gravels running slightly more than $3/yard at the present price of gold. Lambeth, however, did not point out this location to the Government mineral examiner, but stated that he took the gold to Baker to a jewelry store where the jeweler paid him for only 7-1/2 ounces. Although he stated, "I think it would still be on the records," Lambeth was unable to produce any documentation of this sale, and failed to note the name of the store or jeweler to whom the gold was delivered.

Similarly, Lambeth testified that, in November 1976, in the course of two weekends, he and his son-in-law had recovered some 6 ounces of gold on the First Chance Placer. When questioned as to the whereabouts and disposition of the gold, he responded that "My son-in-law has part of it and another party here in John Day has some of it. They weren't home this morning so we didn't get to pick it up" (Tr. 93). Thus, the gold alleged to have been recovered from the First Chance was not produced at the hearing, a development which was repeated when Gaylord Lambeth, who testified to having recovered

"at least a couple of ounces" of gold from 15 or 20 yards of gravel, stated that he had the gold in his possession but was unable to produce it in evidence (Tr. 103). Considering the obvious relevance and importance which would attach to such recoveries, we are of the opinion that claimants' failure to produce the gold seriously detracts from the weight which may be accorded to their claimed recoveries.

In addition to their foregoing statements concerning recoveries from the claims, claimants produced documentary evidence in the form of assay reports derived from samples which Merrill Lambeth took on the claims (Ex. R-4). This assay report consists of an evaluation of six samples, three of which, according to Lambeth, were derived from gravels which were ground before being run through the sluice box, and three of which were derived from unground gravels. The first three samples (the unground group) show no measurable gold content, while the preground samples, Nos. 4, 5, and 6 show .007, .505, and 4.404 ounces of gold/ton, respectively. These three latter samples, we note, were all taken from the Whitehead Smith Claim, while the first three samples were taken from the Unnamed Placer (No. 1) and from the First Chance Placer (Nos. 2 and 3). As contestees state in their brief below, samples 5 and 6 represent impressive values, indicating mineralization worth $75/ton and $660/ton, respectively, at current gold prices.

In reviewing the sum of contestees' evidence, we find that these assay values are the best and most persuasive elements of their cases. But even if the assay results are examined in the most favorable light possible, they would only suggest the existence of a discovery on the Whitehead Smith Claim, and, however impressive values on one claim may be, they cannot inferentially support a finding of discovery on adjoining claims. United States v. Walls, 30 IBLA 333 (1977). We find, moreover, that claimants' evidence, even with respect to the Whitehead Smith Claim, is insufficient to preponderate over the Government's prima facie case.

Where a contest is brought against a mining claim on the ground of lack of discovery, following the filing of an application for a mineral patent, the burden of proof is upon the contestee to show by a preponderance of the evidence that a discovery has been made and even if the evidence produced by the contestee were of equal weight as of that from the Government, he is not entitled to receive a mineral patent. United States v. Altman, 68 I.D. 235 (1961).

Appellants' contentions to the contrary, the fact that they have held the claims at issue for many years without attempting to exploit them suggests that the values discovered on the ground will not support a profitable mining venture. As the Court of Appeals for the 10th Circuit recently held in the case of United States v. Zweifel, 508 F.2d 1150, 1156 (10th Cir. 1975):

> If mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that the claimants have failed to discover valuable mineral deposits or that the market value of discovered minerals was not sufficient to justify the costs of extraction. E.g., United States v. Humboldt Placer Mining Co., 8 IBLA 407 (1972); United States v. Ruddock, 52 L.D. 313 (1927); Castle v. Womble, 19 L.D. 455 (1894).

Appellants attempt to rebut this presumption largely through unsubstantiated personal testimony regarding high values, references to profitable recoveries in the historic past, and two high assay samples derived from a single claim. As we held in United States v. Maley, 29 IBLA 201 (1977), high assay reports alone are not evidence of a discovery. The nature of the samples yielding the high values must be considered and the evidence, taken as a whole, must suggest that the assay results are representative of mineralization on the claims. See also, United States v. Coleman, 390 U.S. 599 (1968). Our opinion in Maley also expressed the well-established rule that reports of substantial mineral recovery in the distant past is of little, if any, significance in establishing the existence of a present discovery on Federal lands. See, United States v. Nicholson, 31 IBLA 224 (1977). Similarly, appellants claims of high-grade gravels lying just below a "false bedrock" are of no probative value, absent affirmative proof of such deposits. As the decision below properly held, the Government's mineral examiner is under no obligation to perform discovery work for mining claimants or to explore beyond the current workings of a claim. Henault Mining Co. v. Tysk, 419 F.2d 786 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970); United States v. Frisco, 32 IBLA 248 (1977). This principle also acts to nullify appellants' complaint regarding the Government's mineral examiner's sampling techniques in that appellants failed to demonstrate that special processing would yield a discovery while the Government was under no obligation to seek such a discovery for them. Frisco, supra.

[3] In support of their claim of discovery, claimants finally argue that the economic viability of a gold placering operation on the claims would be greatly enhanced by the possibility of selling sand and gravel from the claims to offset the cost of gold extraction. Claimants argued at the hearing below (Tr. 56, et seq.) that, since their claims were located prior to the Multiple Use Act of 1955, 30 U.S.C. § 611 (1976), "all mineral resources including sand and gravel" should be considered as factors in the "prudent man" test of a discovery on their claims. (See, Contestee's Posthearing Brief, p. 25.) While it is true that contestees would fall heir to all mineral resources on the claims if a patent should issue, the value of sand and gravel cannot be considered in evaluating the question of whether appellants have made a discovery of placer gold.

The regulation, 43 CFR 3863.1-3, defining the data to be filed in support of an application for patent to a placer mining claim requires a statement of the character of the deposit discovered on the claim, specifically giving the following details as fully as possible:

> If the claim be for a deposit of placer gold, there must be stated the yield per pan, or cubic yard, as shown by prospecting and development work, distance to bedrock, formation and extent of the deposit, and all other facts upon which he bases his allegation that the claim is valuable for its deposits of placer gold; if it be a building stone or other deposit than gold claimed under the placer laws, he must describe fully the kind, nature, and extent of the deposit, stating the reasons why same is by him regarded as a valuable mineral claim.

Each of the patent applications giving rise to these contests recited only the presence of gold bearing gravels with traces of other valuable minerals. None of the patent applications stated any reason why the claim was regarded as valuable for sand and gravel or for any other mineral than gold. The claimants cannot now be heard to assert that their claims are valuable for common variety sand and gravel solely because the claims were located prior to July 23, 1955.

The arguments of appellants that the gold on the claims is coated with a substance that causes it to float through a sluice box without settlingbehind the riffles, as in ordinary placer mining, does not comport with their arguments that there are high grade gravels lying below a false bedrock. If the gold is truly of two types, one coated so that it floats away, and one which sinks to bedrock because of its specific gravity, appellants did not present any credible proof or evidence, or even a lucid explanation to support their anomalous position. As we held in United States v. Silverton Mining and Milling Co., 1 IBLA 15 (1970), aff'd sub nom. Multiple Use, Inc. v. Morton, 504 F.2d 448 (9th Cir. 1974),

> The contestant's assertion that since the claims were located prior to July 23, 1955, the sand, gravel, and building stone deposits need not be other than a common variety is without merit. The act of July 23, 1955, supra, is applicable to mining claims located before that date, but not perfected by a discovery prior thereto. United States v. Melluzzo, supra.
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> Under the circumstances, the sand and gravel and the building stone on the claims cannot be of avail to the contestee in evaluating the claim as a gold operation. A locatable mineral must support a discovery on its own without assistance from the economic

value of a non-locatable one. United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331, 348 (1969).

It has not been shown that a discovery has been made on any of the contested claims such as will support a patent application under the mining laws. Where in a contest brought on an application for a mining patent it is determined that no discovery has been made on the claim, the necessary result of this determination is that the mining claim is invalid. United States v. Carlile, 67 I.D 417 (1960).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Douglas E. Henriques
Administrative Judge

We concur:

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James L. Burski
Administrative Judge

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Joseph W. Goss
Administrative Judge